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September 18, 1997

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND DELIVERY

Mr. William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137

Dear Mr. Caton:

Please find enclosed for filing an original and fourteen copies of the Petition of BellSouth Corporation for Reconsideration and Clarification.

An additional copy of the Petition is enclosed to be date-stamped and returned.

Sincerely,

Austin C. Schlick
Austin C. Schlick Bmm

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan	CC Docket No. 97-137

To: The Commission

PETITION OF BELLSOUTH CORPORATION FOR RECONSIDERATION AND CLARIFICATION

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September 18, 1997

EXECUTIVE SUMMARY

The Commission's Memorandum Opinion and Order ("Order") in this proceeding is an adjudicatory decision that addresses the particular circumstances posed by Ameritech Michigan's application. Yet the Order also provides guidance on several key issues with a view not only to the facts presented by Ameritech in Michigan, but also the numerous section 271 applications that will follow. The Commission's guidance on some of these issues may be intended, or may erroneously be interpreted, to bind future section 271 applicants, just as if the Commission had completed a rulemaking proceeding. BellSouth accordingly seeks reconsideration or clarification of several issues that may be so construed, and on which the Order appears at odds with the requirements of the 1996 Act.

First, the Order's discussion of performance measurements confuses access to a BOC's OSSs with access to the underlying checklist items that are obtained through those OSSs. While the Act's provisions governing unbundling of network elements require nondiscriminatory interfaces with, and processing by, a BOC's support systems, this obligation is separate from duties regarding the BOC's fulfillment of underlying requests for network facilities or services. Moreover, as to OSSs themselves, the performance standards envisioned in the Order may be read unlawfully to require something beyond the statutory obligation of nondiscriminatory access and to interfere with the statutory rights of individual competitors and BOCs to negotiate agreements that meet their needs, subject to state oversight.

Second, the Commission should address ambiguity in the Order by clarifying that the Commission's inquiry extends only to ensuring that "the requested authorization will be carried out in accordance with the requirements of" section 272. 47 U.S.C. § 271(d)(3)(B) (emphasis added). Section 271 does not require that a BOC applicant already be operating a section 272 affiliate.

Third, the Commission should reconsider its discussion of Ameritech's proposed joint marketing "script" and confirm that — as the Commission has already held — a BOC's right to market services jointly with its long distance affiliate, see 47 U.S.C. § 272(g), does not add to the BOCs' existing equal access obligations, see 47 U.S.C. § 251(g).

Fourth, the Order erroneously relies on section 271's public interest test to impose a second local market inquiry over and above that of the competitive checklist. The public interest inquiry does not give the Commission license to undo the delicate balance that Congress struck when it decided to open local markets via the checklist. Nor, for that matter, does it enable the Commission to evade the Eighth Circuit's recent interpretation of particular statutory requirements.

Finally, the Commission should clarify that its guidance on the type, presentation, and timing of evidence in a section 271 application is just that: guidance. The Order might otherwise be read as denying the Commission's statutory obligation to consider all evidence in the record and as adopting new procedures that do not serve the public interest or the Commission's interest in efficient and correct disposition of applications for in-region, interLATA relief.

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To: The Commission

PETITION OF BELLSOUTH CORPORATION FOR RECONSIDERATION AND CLARIFICATION

BellSouth Corporation hereby seeks reconsideration and clarification of the Commission's Memorandum Opinion and Order in this proceeding.[1] Although BellSouth applauds the Commission's efforts to provide the Bell operating companies ("BOCs") with guidance for their future section 271 applications, the Order's discussion of several key issues may be read to impose binding rules that violate the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("1996 Act" or "Act") and exceed the Commission's authority. Clarification of the Order, and in some cases reconsideration, is needed to ensure consistency with the Act.

I. THE ORDER EXTENDS THE CHECKLIST REQUIREMENT OF NONDISCRIMINATORY ACCESS TO OSSs

The Commission should make clear on reconsideration that a BOC's duty to provide nondiscriminatory access to its operations support systems ("OSSs") does not itself impose any

[1] Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, FCC 97-298, CC Docket No. 97-137 (rel. Aug. 19, 1997) ("Order").

requirements regarding the timeliness or quality of the underlying local facilities or services that competitive local exchange carriers ("CLECs") seek when they use OSSs. As drafted, the Order may be read as impermissibly expanding a BOC's obligation to afford nondiscriminatory access to its OSSs into an obligation to provide other network facilities and services (such as local loops or resold services, for example) in a manner the Commission deems competitively desirable. Such a requirement would exceed the Commission's authority under the Act and contradict Commission precedent.

A. The Act and Commission Rules Require Nondiscriminatory Access to Support Systems

The U.S. Court of Appeals for the Eighth Circuit has upheld the Commission's conclusion that OSSs are network elements that incumbent BOCs must make available pursuant to section 251(c)(3) of the Act. Iowa Utils. Bd. v. FCC, No. 96-3321, 1997 U.S. App. LEXIS 18183, at *63-65 (8th Cir. July 18, 1997). The court explained: "[T]he offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service — the functions of operational support systems." Id. at *65.

Because OSSs are network elements under section 251(c)(3), a BOC must provide "nondiscriminatory access to [those] network elements" in order to satisfy checklist item (ii). 47 U.S.C. § 271(c)(2)(B)(ii). As the Commission held in its Local Interconnection Order,[2] CLECs

[2] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, No. 96-3321, 1997 U.S. App. LEXIS 18183 (8th Cir. Jul. 18, 1997).

must be able to "perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself." Id. at 15764, ¶ 518; see also Second Order on Reconsideration, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 19738, 19742, ¶ 9 (1996) ("Second Recon. Order") (Act "mandates equivalent access to OSS functions that an incumbent uses for its own internal purposes or offers to its customers or other carriers"). The Act, however, "does not mandate that requesting carriers receive superior quality access to network elements" as compared to what the incumbent itself receives. Iowa Utils. Bd., 1997 U.S. App. LEXIS 18183, at *79. CLECs are entitled to "unbundled access only to an incumbent LEC's existing network — not to a yet unbuilt superior one." Id. at *80.

What happens after CLECs' requests have made it through these support systems is governed not by the Act's OSS provisions, but rather by the checklist requirements (if any) that address the underlying item ordered. The right of access to OSSs cannot be extended to overlap or trump those independent checklist requirements — nor vice-versa — for the Act expressly states that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist. . . ." 47 U.S.C. § 271(d)(4).

The only instance in which a CLEC's right of access to OSSs and its right to receive another checklist item raise the same legal issue is where the BOC does not itself use the OSSs CLECs need in order to obtain a (non-OSS) checklist facility or service. In those instances the Commission has held that the obligation to offer access to OSS functions is "an essential component" of an incumbent LEC's duty to offer access to all network elements and services for resale. Second Recon. Order, 11 FCC Rcd at 19738, ¶ 9 (citing Local Interconnection Order, 11 FCC Rcd at 15661, ¶ 316, 15763, ¶ 517). Accordingly, any obligation respecting these OSSs arises not from the duty to provide access to the same OSSs the BOC provides itself, but solely from the BOC's obligation to make other network elements or resold services available. Second Recon. Order, 11 FCC Rcd at 19742, ¶ 9.

B. The Order Impermissibly Would Impose Additional Requirements

In light of these principles, the Commission should reconsider the Order's guidance regarding relevant performance measurements, which appears to confuse OSS access with access to the underlying facilities or services CLECs seek. Purportedly to measure the adequacy of OSS access, the Commission required Ameritech to provide data on the underlying items requested by means of OSSs. Specifically, the Commission suggested that to meet its duty of nondiscriminatory access to OSSs under the checklist, Ameritech had a burden to provide evidence regarding average installation intervals for provisioning of resale orders and local loops, e.g., Order ¶¶ 166, 171, 204, not just processing intervals for OSS systems.

Although a BOC might choose to demonstrate both nondiscriminatory access to its OSSs and access to the underlying checklist item simultaneously by comparing performance for CLEC orders to performance for the BOC's own retail orders all the way from order to completion, the BOC need not do so to demonstrate the adequacy of its OSSs. As explained above, the speed and accuracy with which a BOC fills a request after it has passed through the OSSs does not pertain to the requirement of nondiscriminatory access to OSSs.

In addition to requiring irrelevant performance measurements, the Order's OSS discussion suggests that the Commission may seek to enforce impermissible performance standards. The Commission indicated that "[f]or those OSS functions that have no retail analogue, such as the ordering and provisioning of unbundled network elements," the BOC might have to meet particular performance standards that federal regulators deem desirable to facilitate CLEC entry. Order ¶ 141. This approach could in practice exceed the Commission's statutory authority to ensure nondiscrimination, by requiring the BOC to provide a level of access superior to what the BOC itself receives. For example, if a BOC were to process CLEC orders for unbundled network elements using an OSS that the BOC also uses to fill its own retail requests, the required level of CLEC access would be access in "substantially the same time and manner" as what the BOC itself receives. Local Interconnection Order, 11 FCC Rcd at 15764, ¶ 518. The Commission could not require adherence to performance standards that exceed this level of access. See Iowa Utils. Bd., 1997 U.S. App. LEXIS 18183, at *80 (CLECs entitled to "unbundled access only to an incumbent LEC's existing network — not to a yet unbuilt superior one").[3]

The Order's approach also would infringe private negotiations and state authority by forcing BOCs to include in their interconnection agreements performance standards that reflect the preferences of federal regulators, in order to obtain section 271 relief. See Order ¶ 141. Congress directed that local competition be implemented through negotiations between

[3] The same issue would arise where a BOC affords CLECs access to OSSs that interexchange carrier customers use for access service requests ("ASRs"). See generally Local Interconnection Order, 11 FCC Rcd at 15765, ¶ 520 & n. 9. For example, CLECs in BellSouth's region place orders for local interconnection trunking and certain complex unbundled elements using the same Exchange Access Control & Tracking ("EXACT") interface used to process interexchange carriers' ASRs. The interexchange carriers' access would, in this situation, establish the requisite level of CLEC access. See Second Recon. Order, 11 FCC Rcd at 19742, ¶ 9 ("section 251(c)(3) . . . mandates equivalent access to OSS functions that an incumbent uses for its own internal purposes or offers to its customers or other carriers") (emphasis added).

incumbent LECs and CLECs under the supervision of the state commissions. See 47 U.S.C. §§ 251-252. This process allows the market participants to negotiate (or arbitrate) performance or technical standards for OSS access that fit their systems and business plans. State commissions have "the primary authority" to oversee the negotiations and enforce the substantive terms of agreements made pursuant to sections 251 and 252. Iowa Utils. Bd. v. FCC, 1997 U.S. App. LEXIS 18183, at *48. The Commission may not short-circuit this process by using section 271 to dictate standards that the BOCs must incorporate when they negotiate their agreements at the state level. See id. at *37 (Commission may not impose rules that "thwart the negotiation process"); id. at *45-50 (Commission has no review or enforcement duties relating to negotiated or arbitrated agreements that would allow it to mandate standards).

Accordingly, the Commission should clarify on reconsideration that it will not deny section 271 approval on the basis that the BOC's interconnection agreements do not contain specific performance standards for OSSs.

II. THE COMMISSION SHOULD CLARIFY THAT THE ACT DOES NOT REQUIRE SECTION 272 COMPLIANCE PRIOR TO SECTION 271 AUTHORIZATION

The Order states that "[a]lthough BOCs need not comply with the requirements we adopted in the Accounting Safeguards Order prior to the effective date of that order, BOCs were still obligated to comply with the statute," including its transaction-disclosure requirements, "as of the date it was enacted." Order ¶ 371 (citing 47 U.S.C. § 272(b)(5)). The Commission should clarify that this statutory requirement applies only to transactions with a section 272 affiliate and a BOC need not establish such an affiliate until it exercises interLATA authority.

Section 271(c)(3)(A)(B) employs the future tense, authorizing the Commission to ensure that "the requested authorization will be carried out in accordance with the requirements of section 272" (emphasis added). While "past and present behavior" may be relevant to ensuring future compliance with section 272 (and in Ameritech's case was "highly relevant" because Ameritech claimed already to be in compliance), Order ¶ 366, the Act does not empower the Commission to require full section 272 compliance before the BOC applicant receives interLATA authorization. The Commission should make clear that a BOC may satisfy its obligations by establishing a section 272 affiliate (in accordance with any representations in the application) after authorization but before providing in-region, interLATA services.

III. THE ORDER'S GUIDANCE ON MARKETING SCRIPTS CONTRADICTS SECTIONS 251 AND 272 OF THE ACT AS WELL AS COMMISSION PRECEDENT

Section 251(g) preserves a BOC's pre-existing obligation to provide equal access. The Act, however, also authorizes the BOCs and their section 272 affiliates to market their services jointly upon receiving interLATA relief under section 271. 47 U.S.C. § 272(g)(2). In the Non-Accounting Safeguards Order[4] the Commission struck a balance between the right of a BOC and its affiliate to market services jointly and the BOC's continuing obligations under section 251(g). The Commission explained that "the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g)." Id. at 22046, ¶ 292. Rather, a BOC can meet

[4] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905 (1996), recon. 12 FCC Rcd 2297(1997), further recon. FCC No. 97-222 (rel. June 24, 1997), pet'n for review pending sub nom. Bell Atlantic Tel. Cos. v. FCC, No. 97-1423 (D.C. Cir. filed Jul. 11, 1997).

its equal access obligations, while joint marketing, by "inform[ing] new local exchange customers of their right to select the interLATA carrier of their choice and tak[ing] the customer's order for the interLATA carrier the customer selects." Id.

In explaining that the two provisions were compatible, the Commission relied on the ex parte comments of NYNEX, id. & n.764, in which NYNEX set forth a marketing script reflecting the fact that section 251(g) "does not continue the MFJ's prohibition against 'marketing,'" but "only continues the requirement to advise new customers of available carriers if the customer does not name a long distance carrier."[5] The NYNEX script that the Commission cited approvingly informed customers that they had a choice of carriers, but did not require NYNEX representatives to list all of the eligible interexchange carriers until after NYNEX had mentioned its own long distance affiliate and asked the customer if he or she had already made a selection.[6]

The Commission's acceptance of this balanced approach made sense. Any requirement that the BOC's long distance affiliate be mentioned only as part of a random list would nullify the BOC's statutory joint marketing right. Moreover, requiring a BOC to list every interexchange carrier even when the customer (after thirteen years of equal access and exposure

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[5] Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission at 3 (Oct. 23, 1996) ("Guyer Letter") (emphasis added).

[6] "[T]he NYNEX customer service representative would inform the customer that a number of companies provide long-distance service, including NYNEX Long Distance Company, and offer to send material regarding NYNEX long distance." Guyer Letter at 3. "If the customer indicates that he or she wants another long-distance carrier (e.g., MCI, Sprint, etc.), NYNEX would then process the presubscription request .... If the customer wanted to hear more about NYNEX Long Distance, the representative would then provide information on NYNEX Long Distance products and services .... If the customer indicates that he/she is not sure as to which carrier to choose, the representative would offer to read a randomly-generated list of available carriers including NYNEX Long Distance." Id.

to numerous carriers' marketing efforts) has already made up his or her mind would impose a needlessly burdensome obligation that would slow the presubscription process and annoy the BOC's local customers.

Yet the Order suggests the Commission might reject a future application by Ameritech if Ameritech directed its customer service representatives to "[m]ention only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers." Order ¶ 376. This is flatly inconsistent with the Commission's prior recognition that section 251(g) does not add to a BOC's pre-existing equal access obligations and that, under section 272(g), a BOC must be permitted to market the services of its long distance affiliate. Non-Accounting Safeguards Order, 11 FCC Rcd at 22046, ¶ 292. If the statute's express joint marketing authorization is to mean anything, a BOC cannot be denied the opportunity to bring its affiliate's services to the customer's attention in a preferential fashion. See Babbitt v. Sweet Home Chapter of Communities for a Better Oregon, 115 S. Ct 2407, 2426 (1995) ("statutes should be read . . . to give independent effect to all their provisions"); see also Weinberger v. Hynson, Westscott and Dunning, Inc., 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible'").[7] The Commission thus should clarify that a

[7] The Order's restrictions on joint marketing raise First Amendment concerns as well. The Commission may not restrict a BOC's ability to disclose "truthful, verifiable, and nonmisleading factual information" about its long distance affiliate's offerings absent a "substantial" government interest that reasonably "fit[s]" the Commission's restriction. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1590 (1995); Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993). Because the Order's approach to presubscription would deprive the BOCs of a statutorily protected right to engage in joint marketing, it fails both prongs of this test. The Commission's suggested approach might, in addition, run afoul of the constitutional prohibition on coercing parties to deliver messages with which they disagree. See Pacific Gas & Elec. Co. v.

BOC may mention its own long distance affiliate and ask customers if they have selected a carrier before the BOC is required to list all available carriers in random order.

IV. THE PUBLIC INTEREST TEST DOES NOT AUTHORIZE ADDING BLANKET REQUIREMENTS REGARDING LOCAL COMPETITION OR SUPERCEDING LOCAL COMPETITION PROVISIONS

The Order indicates that the Commission may in the future condition public interest approval on whether the BOC has met a Commission-created local competition test, over and above Congress' competitive checklist. Indeed, the Order appears to use the public interest inquiry not only to extend the checklist in contravention of section 271(d)(4), but also to evade the Eighth Circuit's interpretations of specific checklist provisions. While discrete aspects of this issue are presently before the Eighth Circuit,[8] the Commission should at a minium reconsider its general approach to the public interest test and its specific policy with regard to the Commission's vacated "pick and choose" rule.

Public Util. Comm'n, 475 U.S. 1, 10-11 (1986); cf. Glickman v. Wileman Brothers & Elliott, Inc., 117 S. Ct. 2130, 1997 U.S. LEXIS 4036, at *22 (1997) (contrasting situation in which complainants "agree with the central message of the speech").

[8] See Petition of the State Commission Parties and the National Association of Regulatory Utility Commissioners for Issuance and Enforcement of the Mandate (filed Sept. 17, 1997) & Petition [of Ameritech, et al.] for Immediate Issuance and Enforcement of the Mandate (filed Sept. 18, 1997), Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir.). These petitions point out that because pricing matters under section 252 are reserved to the states, and the checklist simply requires compliance with section 252's pricing rules, the checklist does not authorize the Commission to override state pricing authority and condition BOC interLATA entry upon compliance with federal pricing rules. If the Eighth Circuit confirms that the competitive checklist reserves pricing authority to the states, the Commission also may not use the public interest test to rewrite that provision of the checklist. The Commission's policies regarding combinations of UNEs, another issue the Commission addressed incorrectly in this proceeding, are also before the Eighth Circuit. See Bell Atlantic, Petition for Rehearing, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. filed Aug. 29, 1997); Order ¶¶ 160, 336 (discussing combinations).

A. The Commission May Not Impose a Broadly Applicable Local Market Test Over and Above the Act's Competitive Checklist

Absent case-specific competitive analysis of a BOC's long distance entry, the Commission may not condition public interest approval on standards such as whether the applicant has taken steps to ensure that "all procompetitive entry strategies are available to new [local] entrants," Order ¶ 387, or whether there are any "barriers" at all to local competition, id. ¶ 390. Indeed, no rationale could justify extending the checklist's specific local competition requirements in violation of section 271(d)(4).

While the public interest inquiry generally may provide the Commission with "broad discretion . . . to consider factors relevant to the achievement of the goals and objectives of" the legislation, Order ¶ 385, it is limited by Congress' specific determinations. See NAACP v. FPC, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation"). In the 1996 Act, Congress decided that it could open local markets most effectively by enacting a competitive checklist that sets forth concrete obligations in plain terms. The "checklist" was Congress' test of "what . . . competition would encompass," 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings), and Congress forbade the Commission from second-guessing its judgment or modifying its checklist "by rule or otherwise." 47 U.S.C. § 271(d)(4) (emphasis added); see also 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (noting adoption of checklist approach in place of "actual competition" test). As the Chairman of the Senate Commerce Committee reassured Senators opposed to including the public interest inquiry in what became section 271, "[t]he FCC's public-interest review is constrained by the statute" because "the FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist." 141 Cong. Rec. S7942, S7967 (daily ed. June 8, 1995) (statement of Sen. Pressler). Accordingly, the Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist. See Business Roundtable v. SEC, 905 F.2d 406, 413 (D.C. Cir. 1990) ("broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'") (quoting NAACP v. FPC, 425 U.S. at 670); New York Central Sec. Corp. v. United States, 287 U.S. 12, 25 (1932) ("the term public interest' as thus used [in a statute] is not a concept without ascertainable criteria").

The Order, however, suggests that public interest approval should be conditioned in every case on exceeding the checklist. The Commission reasoned that because Congress (1) wanted the Bell companies to enter long distance only after local markets are open and (2) included both the competitive checklist and the public interest test in section 271, Congress must have viewed the competitive checklist as an inadequate mechanism to open local markets.[9] This ignores that Congress enacted the public interest inquiry so that the Commission could confirm the legislative judgment that the checklist and section 272's safeguards would suffice to protect interLATA competition.[10] Congress simply wanted an expert agency to confirm that a market opened in

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[9] See Order ¶ 389 (reasoning that if "compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition," then "BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist") .

[10] See 141 Cong. Rec. S7972, S8012 (daily ed. June 8, 1995) (statement of Sen. Hollings) ("we have had every particular safeguard that you can imagine, that the lawyers could think of . . . to make sure that it works and works properly for the public interest").

accordance with the competitive checklist would, together with the imposition of regulatory safeguards, ensure that a BOC's interLATA entry is not anticompetitive.[11] The Commission's contrary view is wholly implausible, for it depends upon a supposition that legislators devoted countless hours to honing the smallest details of the checklist and forbade the Commission from altering them, see 47 U.S.C. § 271(d)(4), even though they wanted the Commission to use some different standard of open local markets as the dispositive test in considering BOC applications.[12]

When it takes up the issue, the Commission will have to find that compliance with the checklist and section 272 will ensure that a BOC's interLATA entry cannot cause any competitive harm. The Eighth Circuit has confirmed that the express requirements of sections 251 and 252 do "effectively ope[n] up local markets," making it unnecessary to impose additional criteria through the public interest test to accomplish this.[13] Furthermore, the Commission has repeatedly affirmed the effectiveness of regulatory safeguards that protect against cross-subsidy and discrimination.[14] The Commission has explained that the BOCs cannot

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[11] Order ¶ 388; see 141 Cong. Rec. S7942, S7969 (daily ed. June 8, 1995) (statement of Sen. Lott) (public interest test allows Commission to "make sure that we have a fair and level playing field"); 141 Cong. Rec. S7881, S7888 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("After Bell companies satisfy all the requirements, the FCC must, in effect, certify compliance by making a public interest determination.").

[12] See, e.g., 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (describing extensive negotiations and work that went into developing the competitive checklist).

[13] Iowa Utilities Bd. v. FCC, 109 F.3d 420, 421 (1996) (order granting stay pending judicial review) (1996); see California v. FCC, No. 96-3519, slip op. at 10 (8th Cir. Aug. 22, 1997) (sections 251 and 252 "accomplish th[e] objective" of opening local markets).

[14] The Commission has explained that the rationale for excluding the BOCs from long distance arose from worries that (1) if regulators tie local telephone revenues to costs, "a BOC may have an incentive to improperly allocate to its regulated core business costs that would be

drive other interexchange carriers from the market through cost misallocation, that price caps reduce or eliminate incentives to misallocate costs, and that the Commission's safeguards "will constrain a BOC's ability to allocate costs improperly and make it easier to detect any improper allocation of costs that may occur."[15] The Commission likewise has dismissed fears of predation against the established long distance incumbents, id. ¶ 108; has found that the numerous protections against discrimination will prevent Bell companies from gaining market power upon entry through such tactics, id. ¶¶ 111-119; and has concluded that any risk of price squeezes can adequately be addressed through its administrative procedures and the antitrust laws, id. ¶¶ 128-129.

In short, because statutory and existing regulatory safeguards will ensure that BOC interLATA entry does not threaten competition, the Commission may not impose additional local competition requirements absent special circumstances. Nor could the Commission justify micro-managing local competition as a way of speeding its removal of regulatory safeguards under section 272. See 47 U.S.C. § 272(f)(1). Excessive regulation today cannot be defended in the name of deregulation tomorrow.[16] The Commission should make clear that it will not impose

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properly attributable to competitive ventures" and (2) "a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications . . . marke[t]." Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 18877, 18882, ¶¶ 7-8 (1996).

[15] Third Report and Order, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, FCC 97-142, CC Docket No. 96-61, ¶¶ 104-106. (rel. Apr. 18, 1997).

[16] See MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980) (when designing regulations, "[t]he best must not become the enemy of the good."); see also Conference Report at 1 (enacting a "de-regulatory national policy framework"); 141 Cong. Rec.

any local competition standard beyond satisfaction of the checklist and future compliance with section 272, absent a specific determination that these two conditions are insufficient to protect against competitive harm from approval of the application.

B. The Language of the Order Is Contrary to the Eighth Circuit's Construction of Section 252(i)

The Order not only appears to extend the checklist by imposing an additional local market test that overrides the checklist, but also suggests that the Commission may seek to use the public interest inquiry to evade the Eighth Circuit's decision striking down the Commission's "pick and choose" rule. See 47 C.F.R. § 51.809(a) (1996). While the contours of the public interest inquiry may not be precisely defined in every respect, it should be beyond controversy that the Commission may not use the public interest inquiry to rewrite express provisions of the Act.

The Eighth Circuit rejected the pick and choose rule as an "unreasonable construction of the Act." Iowa Utils. Bd., 1997 U.S. App. LEXIS 18183 at *40. The court explained that requiring incumbents to make each provision of an agreement available in isolation to all CLECs "would thwart the negotiation process" that is central to the Act's local competition provisions and thereby "conflict[] with the Act's design." Id. at *37, *40.

Yet the Order suggests that the Commission will impose the same requirement under the guise of section 271's public interest authority. Using language from the Commission's unlawful rule, the Order says that the Commission will consider relevant to its public interest inquiry

S7881, S7895 (statement of Sen. Hollings) ("We should not attempt to micro-manage the marketplace"); 141 Cong. Rec. H8281, H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) (Congress wanted to promote "competition, and not Government micro-management of markets").

"evidence that a BOC is making available, pursuant to contract or otherwise, any individual interconnection arrangement, service, or network element provided under any interconnection agreement to any other requesting telecommunications carrier upon the same rates, terms, and conditions as those provided in the agreement." Order ¶ 392.

It does not matter whether the "pick and choose" rule is a hard and fast requirement for all incumbent LECs, or a heuristic device that applies to all BOCs when they seek interLATA authority. Either way, the Commission would impose a requirement that "conflicts with the Act's design" and express language. The public interest test cannot be stretched that far. See NAACP v. FPC, 425 U.S. at 669; United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" statutory provision's meaning is "clarified by the remainder of the statutory scheme") (internal quotation marks omitted); National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (the public interest "is to be interpreted by its context").

V. THE COMMISSION SHOULD CLARIFY THAT THE ORDER DOES NOT ALTER A BOC APPLICANT'S EVIDENTIARY BURDEN

In its initial Public Notice establishing "Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act," the Commission explained that it would not approve a section 271 application absent evidence supporting each of the three requirements of section 271(d)(3) and that it "expect[ed] that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon." Public Notice, FCC 96-469, at 2 (Dec. 6, 1996). The Commission warned that if "the applicant submits (in replies or ex parte filings) factual evidence that changes its application in a material respect, the Commission reserves the right to deem such submission a new application and start the 90-day review process anew." Id. (emphasis added).

The Order provides additional guidance on the type of evidence the Commission may find helpful,[17] on how BOCs should present their evidence so that the Commission can easily digest it, see id. ¶¶ 60-61, and on the timing of evidentiary submissions, id. ¶ 51. The Commission should make clear, however, that the Order does not alter the basic contours of its inquiry or the evidentiary burden on applicants. The record as a whole must include sufficient evidence to support an affirmative Commission finding on each of the requirements of section 271(d)(3). While the Commission might find some types of evidence most persuasive, it may not flatly refuse to consider other types of evidence. The BOC retains the right to determine how to make its case. For example, if a BOC presents competent evidence that access to its OSSs is nondiscriminatory and rebuts any allegations to the contrary, then it has met its burden of proof[18] and the Commission may not put it to the effort and expense of accumulating different types of evidence specified by the Commission.

Likewise, while the Commission might refuse to consider new, non-responsive evidence submitted by any party in the reply round (on the ground that no party will have an opportunity to

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[17] See, e.g., id. ¶ 57 (urging BOCs to respond to complaints in state proceedings); id. ¶ 206 (urging BOCs to provide evidence comparing CLEC and BOC OSS access).

[18] See Sea Island Broadcasting Corp. Of S.C. v. FCC, 627 F. 2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980) ("The use of the 'preponderance of the evidence' is the traditional standard in civil and administrative proceedings.").

respond to it), Order ¶ 51, the Commission cannot refuse to consider evidence supporting the application submitted by commenters (including a state commission or the Department of Justice) in their responses to the application. This is particularly true where it would accept evidence challenging the application if submitted at the same time. Such unequal treatment would be fundamentally unfair and contrary to the Commission's proper goal of sound, informed decisions on all applications. See 5 U.S.C. § 556(d) (Commission must consider entire record).

In short, the Commission should confirm that the Order's guidance about appropriate evidence is just that: guidance. It does not alter either the Commission's or a BOC applicant's basic statutory obligations, or the standards of the December 6 Public Notice.

CONCLUSION

The Commission should reconsider or clarify those portions of the Order that may be construed to conflict with the Act, the Iowa Utilities Board opinion, and Commission precedent.

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September 18, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 1997, copies of the Petition of BellSouth Corporation for Reconsideration and Clarification were served by U.S. mail, first class, postage prepaid or hand delivery upon the following parties:

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